

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Katherine Barrett	Team: Bias Squad #01	CCRB Case #: 202301078	<input checked="" type="checkbox"/> Force <input type="checkbox"/> Discourt. <input type="checkbox"/> U.S. <input checked="" type="checkbox"/> Abuse <input type="checkbox"/> O.L. <input type="checkbox"/> Injury
Incident Date(s) Saturday, 01/14/2023 5:30 PM	Location of Incident: Union Square/14th Street subway station	18 Mo. SOL 7/14/2024	Precinct: 13
Date/Time CV Reported Tue, 02/07/2023 10:53 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 02/07/2023 10:53 AM

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. PO Joseph Wetzel	24843	967390	TD 4
2. PO Ahteramul Haque	08611	970581	TD 4
3. PO Mohammad Hossain	02679	960680	TD 4

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Arjun Acharjee	11336	960125	TD 4

Officer(s)	Allegation	Investigator Recommendation
A . PO Ahteramul Haque	Abuse: Police Officer Ahteramul Haque stopped § 87(2)(b)	
B . PO Mohammad Hossain	Force: Police Officer Mohammad Hossain used physical force against § 87(2)(b)	
C . PO Joseph Wetzel	Force: Police Officer Joseph Wetzel used physical force against § 87(2)(b)	
D . PO Ahteramul Haque	Force: Police Officer Ahteramul Haque used physical force against § 87(2)(b)	
E . PO Ahteramul Haque	Abuse: Police Officer Ahteramul Haque took law enforcement action based upon actual or perceived age, gender, and race.	

Case Summary

On February 7, 2023, § 87(2)(b) a twenty-year-old Asian woman, filed this complaint via CCRB's automated recording system (**BR 1**).

On January 14, 2023, at approximately 5:30 p.m., § 87(2)(b) entered the Union Square subway station in Manhattan by walking through an open emergency exit gate that several other people had already walked through. Present in the vicinity of the entrance were Police Officer Ahteramul Haque, Police Officer Arjun Acharjee, Police Officer Joseph Wetzel, and Police Officer Mohammad Hossain, all of Transit District 4. PO Haque approached § 87(2)(b) and stopped her (**Allegation A: Abuse of Authority**, § 87(2)(g) PO Wetzel and PO Hossain assisted PO Haque in surrounding § 87(2)(b) placing her in handcuffs, and writing her two summonses. § 87(2)(b) alleged that officers grabbed her painfully by the arms and wrists, pulled her by the arms, and fastened her handcuffs overly tightly (**Allegations B, C, D: Force**, § 87(2)(g) It is alleged that PO Haque took law enforcement action against § 87(2)(b) based on her race, gender, and age (**Allegation E: Abuse of Authority - Bias-Based Policing**, § 87(2)(g)

The investigation received body-worn camera footage from PO Haque, PO Wetzel, PO Hossain, and PO Acharjee (**BR 4-7**) and cell phone video from § 87(2)(b) (**BR 2**).

Investigating Attorney Kenneth Crouch was initially assigned to this case. The case was transferred to Investigating Attorney Katherine Barrett on October 23, 2023.

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Ahteramul Haque stopped § 87(2)(b)
Allegation (B) Force: Police Officer Mohammad Hossain used physical force against § 87(2)(b)

Allegation (C) Force: Police Officer Joseph Wetzel used physical force against § 87(2)(b)
Allegation (D) Force: Police Officer Ahteramul Haque used physical force against § 87(2)(b)

It is undisputed that § 87(2)(b) entered the Union Square subway station by walking through the emergency exit gate without paying the fare and that she was stopped by PO Haque.

§ 87(2)(b) was interviewed on February 17, 2023 (**BR 3**). She testified that after being stopped, the officers put her in handcuffs and repeatedly grabbed her wrists and arms “very firmly” and pulled her around, which hurt her. She described her hands as very small and noted that at one point, her wrist slipped out of the handcuff and an officer she could not identify refastened the handcuffs “super-tight.” The officers accused her of trying to run away even though she was surrounded by officers who were much larger than her, she was not running away, and she could not run away even if she wanted to.

The investigation received body-worn camera footage from PO Haque, PO Wetzel, PO Hossain, and PO Acharjee (**BR 4-7**). PO Haque's recording shows that after § 87(2)(b) walks through the gate, PO Haque approaches § 87(2)(b) and asks if she paid her fare (**BR 4**, timestamp 2:30). She initially says that she did pay with her card and attempts to keep walking for a few feet, but PO Haque walks next to her. PO Wetzel approaches and tells § 87(2)(b) to slow down and answer the question. § 87(2)(b) walks a few more feet while PO Haque and PO Wetzel walk with her. § 87(2)(b) continues to insist that she paid with her credit card and eventually takes her wallet out and points at her card. She takes a step forward and then backwards while arguing with the officers. PO Haque asks for

her ID and PO Wetzel tells her that she is not free to move anymore. § 87(2)(b) turns her head and body away from PO Wetzel and PO Wetzel grabs onto the right arm of a heavy leather jacket that § 87(2)(b) is wearing. He appears to only be holding onto the fabric of the jacket (BR 4, 2:30-3:15). While holding onto her jacket, PO Wetzel tells § 87(2)(b) “Miss, I will put you in handcuffs. You need to stop moving and start cooperating.” § 87(2)(b) pulls her arm away from PO Wetzel and continues arguing with the officers while PO Haque again asks for her ID (BR 4, 3:15-3:37). From PO Hossain’s vantage point several feet away, § 87(2)(b) can be seen taking several steps backwards while arguing with PO Haque and PO Wetzel during this time period (BR 5, 3:22-3:42).

While stepping backwards, § 87(2)(b) takes her cell phone out and says that she is going to call the police. PO Wetzel and PO Haque grab hold of her arms and tell her that they are the police. PO Hossain approaches and also tells her that they are going to put handcuffs on her if she keeps moving. PO Haque and PO Wetzel both ask for her ID multiple times, and § 87(2)(b) ignores them while typing on her cell phone. PO Wetzel says, “Okay, you’re going to be detained until we find out who you are.” PO Haque tries to grab § 87(2)(b) left arm, but she pulls it away from him. When PO Haque is able to grab her arm, she puts her left hand into her left jacket pocket. PO Haque says, “Stop resisting, ma’am,” while attempting to put a handcuff on her left wrist. He takes her left hand out of her pocket and puts the handcuff on. PO Wetzel helps PO Haque get the handcuff on her right wrist (BR 4, 3:37-4:35).

After § 87(2)(b) is in handcuffs, PO Haque again asks her for her ID and says that otherwise they will take her to the stationhouse. § 87(2)(b) says that her ID is in her wallet, and PO Wetzel removes § 87(2)(b) university ID from her wallet and hands it to PO Haque. The officers take § 87(2)(b) by the arm and walk her several feet away, out of pedestrian foot traffic. PO Wetzel explains to § 87(2)(b) that they had to detain her and put her in handcuffs because PO Haque observed her walk through the gate and she kept trying to walk away from them as they initiated a stop, refused to acknowledge them, and refused to listen to lawful orders (BR 4, 4:40-6:43).

While waiting for PO Haque to write her summonses, § 87(2)(b) slips out of her handcuffs. PO Wetzel says, “This is just stupid,” and grabs her right arm while PO Haque grabs her left arm. PO Hossain handcuffs § 87(2)(b) behind her back again and then holds onto the handcuffs with his right hand (BR 6, 7:01-8:25). A few minutes later, § 87(2)(b) tells PO Hossain to let go of the handcuffs because he is hurting her. PO Hossain initially says that he has to hold onto them because she keeps moving, but after approximately fifteen seconds he lets go of the handcuffs and § 87(2)(b) stands handcuffed next to the officers (BR 6, 14:16-14:37).

PO Haque wrote § 87(2)(b) two Transit Adjudication Bureau Notices of Violation (TAB/NOV). One TAB/NOV is for failing to pay the fare in violation of 21 N.Y.C.R.R. §1050(4)(a) and the other is for refusing to obey a lawful order in violation of 21 N.Y.C.R.R. § 1050(6)(d) (BR 11). At the end of the interaction, § 87(2)(b) is given the TAB/NOV’s and allowed to leave. She is not ejected from the subway (BR 6, 16:52-17:27).

PO Wetzel was interviewed on July 26, 2023 (BR 16). He testified that he grabbed the arm of § 87(2)(b) jacket and put § 87(2)(b) in handcuffs because she refused multiple requests to provide identification and she continued to move and back away from the officers when they were attempting to detain her. PO Wetzel testified that § 87(2)(b) was never under arrest.

PO Haque was interviewed on March 7, 2024 (BR 17). He similarly testified that he placed § 87(2)(b) in handcuffs because she refused to provide identification and kept trying to move away from the officers while they were attempting to conduct a stop. He stated that the only time he touched § 87(2)(b) was when he grabbed her hands in order to put handcuffs on her, which he did because she kept

moving her hands when he was trying to apply the handcuffs.

PO Hossain and PO Acharjee were not interviewed for this case because the investigation was able to make determinations on all allegations without their testimony.

Under 21 N.Y.C.R.R. §1050(4)(a), no person shall enter or use transit facilities without the payment of the fare (**BR 13**).

Under 21 N.Y.C.R.R. § 1050(6)(d)(1), all persons inside any transit facility or conveyance must comply with all lawful orders and directives of any police officer acting within the scope of their employment (**BR 13**).

Patrol Guide Procedure 209-39 provides that when an officer observes a subject violating a provision of the NYC Transit Rules of Conduct within the NYC Transit system, including fare evasion, officers are required to (i) take the violator into custody and inform the violator of the offense committed, unless physical resistance, flight, or other factors render such notification impractical, (ii) request and verify the violator's identification, (iii) run a background check on the violator, and (iv) if the background check establishes that the violator qualifies for a Transit Adjudication Bureau (TAB) Notice of Violation (NOV), issue the violator a TAB/NOV in lieu of arrest. It further provides that a violator is disqualified from receiving a TAB/NOV summons if the violator is not properly identified or valid residence cannot be ascertained. An officer is directed to remove the violator to their Transit District command or to a designated arrest facility if the violator is disqualified from receiving a TAB/NOV summons. The officer is then to allow the violator to contact a third party to obtain identification and proof of residence and/or to utilize Department computer systems and devices to ascertain the identity of the violator. If identity and proof of residence are established, the officer should issue a TAB/NOV summons. (**BR 14**).

Patrol Guide Procedure 221-01 establishes that "[f]orce may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody." All applications of force must be reasonable under the circumstances and members of the service "must use reasonable force, employ less lethal alternatives, and prioritize de-escalation, whenever possible." (**BR 15**).

While "handcuffs are generally recognized as a hallmark of formal arrest," the use of handcuffs during a non-arrest detention does not automatically elevate that detention to an arrest. *United States v. Bailey*, 743 F.3d 322, 340 (2d Cir. 2014). "[H]andcuffing is permissible in such a detention only when justified by the circumstances." *People v. Steinbergin*, 159 A.D.3d 591 (1st Dep't 2018). Factors that courts have considered in determining whether handcuffing was permissible in non-arrest situations include whether there was reason to believe the individual being detained was armed, dangerous, or likely to resist arrest or flee. *People v. Perez*, 170 A.D.3d 495 (1st Dep't 2019). (**BR 21**).

It is undisputed that PO Haque stopped § 87(2)(b) after observing her enter the transit system without payment of the fare in violation of 21 N.Y.C.R.R. §1050(4)(a), § 87(2)(g)

Once PO Haque observed § 87(2)(b) commit a violation of the NYC Transit Rules of Conduct, he followed NYPD procedures by detaining her and requesting her identification. Body-worn camera footage shows that § 87(2)(b) ignored multiple requests to provide identification and stepped backwards away from the officers while they were speaking to her, after being informed that she was being detained and she was not free to leave. These movements and her refusal to acknowledge

the officers' orders could reasonably be interpreted as indicators that § 87(2)(b) might attempt to flee, which is what both PO Haque and PO Wetzel testified to in their interviews. § 87(2)(g)

§ 87(2)(g)

Although § 87(2)(b) stated in her interview that PO Hossain handcuffed her very tightly the second time, body-worn camera footage of the incident does not depict her complaining of pain when he handcuffed her. The only time that § 87(2)(b) complained of pain on body-worn camera, PO Hossain let go of her handcuffs within several seconds. § 87(2)(g)

Allegation (E) Abuse of Authority: Police Officer Ahteramul Haque took law enforcement action based upon actual or perceived age, gender, and race.

§ 87(2)(b) is an Asian woman who at the time of this incident was 20 years old, stood 5'4" and weighed 110 pounds. During her interview, § 87(2)(b) testified that she walked through the open emergency gate behind two men. She thought that the first man was white and that the second man was possibly Middle Eastern and was wearing a beanie and scarf. She walked through the gate so close to these men that she did not need to touch the gate as she walked through because it was already open. Five to ten other men walked through the gate after her. § 87(2)(b) believes that she was targeted as an Asian woman because she visibly presents as a cisgendered East Asian woman, and she did not see any other women or East Asian individuals walk through the gate before or after her. § 87(2)(b) did not see any other reason why PO Haque and the other officers would approach only her when there were four officers present at that location and many other people were committing the same violation at the same time as her. (BR 3).

The investigation received cell phone footage from § 87(2)(b) which was filmed by witness § 87(2)(b) (BR 2). § 87(2)(b) was interviewed on April 21, 2023, and stated that she observed four officers stop § 87(2)(b) for fare evasion and that other individuals of various races were committing fare evasion by walking through the emergency exit gate while the officers conducted their stop of § 87(2)(b) (BR 26).

PO Haque's body-worn camera recording begins with himself and PO Hossain standing in the mezzanine of the Union Square subway station near PO Acharjee and PO Wetzel. PO Wetzel is speaking to an unknown female civilian. The officers are standing slightly inside the paid area of the station near stairs leading down to the uptown 4/5/6 platform. A set of turnstiles and an emergency exit gate are visible beyond the stairs. PO Acharjee approaches a young Asian woman who was walking from the direction of the turnstiles and begins writing her a summons for fare evasion, and PO Haque and PO Hossain join him (BR 4, 0-1:10). PO Acharjee's memo book indicates that this individual was a twenty-two-year-old Asian woman named § 87(2)(b). § 87(2)(b) did not file a complaint and is not a party to this investigation.

As of 1:20 on PO Haque's recording, PO Wetzel is no longer speaking to the unknown female civilian and is standing unoccupied a few feet away from the other officers. PO Acharjee asks § 87(2)(b) to step to the side and they stand slightly out of the path of pedestrian foot traffic while PO Acharjee fills out a summons for § 87(2)(b). PO Hossain stands next to PO Acharjee and § 87(2)(b). PO Haque stands several feet behind the three of them, where he can see both PO Acharjee

completing the summons in front of him to the left and the turnstiles and emergency exit gate in front of him to the right. (**BR 4**, 1:20-1:40).

At 1:46, an individual exits the station through the emergency exit gate and the emergency exit alarm begins going off continuously. At 1:50, the first person walks into the station through the emergency exit gate. Between 1:50-2:10, another twelve individuals walk in through the emergency exit gate while PO Haque's body-worn camera is facing in that direction. From 2:10-2:16, the emergency gate is not in frame on PO Haque's body-worn camera. From 2:16-2:19, two more individuals walk in through the gate before it is briefly obscured by pedestrians walking in front of PO Haque. At 2:21, an individual wearing all black wearing a black backpack walks in through the gate. At 2:22, § 87(2)(b) walks in through the gate a few feet behind this individual. (**BR 4**).

The investigation subpoenaed footage from the MTA in order to get a better view of the individuals who walked in through the emergency gate before § 87(2)(b) but the case was filed three weeks after the incident date, which prevented the investigation from being able to obtain this video evidence before it expired. Although the body-worn camera footage received in this case is not as high quality as surveillance video likely would have been, the investigation attempted to assess the races, genders, and ages of the individuals who committed fare evasion before § 87(2)(b) based on this footage.

Based on PO Haque's body-worn camera footage, the races, genders, and ages of the sixteen individuals who can be seen on camera entering the station through the gate before § 87(2)(b) appear to vary (**BR 4**, original footage; **BR 37**, a cropped sub-clip of the lower right-hand corner of PO Haque's body-worn camera magnified to 226%). The first individual who entered the gate was wearing a beanie and carrying a large clear garbage bag full of cans. This person walks by PO Wetzel at 0:09 on his recording and appears to be a middle aged Asian male or female with short hair (**BR 6**). The second person appears to be a tall woman with a medium skin tone wearing a dark coat, who does not appear to be of East Asian descent. The third person appears to be a male with a medium skin tone wearing a grey coat, tan pants, a beanie, and a medical mask, who does not appear to be of East Asian descent (**BR 37**, 0:12-0:19). This person also walks by PO Wetzel at 0:13 on his recording (**BR 6**). The fourth and fifth people appear to be a Black woman wearing a purple coat holding hands with a young Black boy. The sixth person's race and gender could not be determined. The seventh and eighth people appear to be a Black woman wearing a black coat and a dark-skinned woman wearing a burka and carrying a red bag. The ninth person appears to be a short young woman with a light skin tone whose race cannot be determined. The twelfth individual appears to be a woman of indeterminate age with a light skin tone and curly hair, who does not appear to be of East Asian descent. The race, gender, and age of individuals ten, eleven, and thirteen could not be determined. The race, gender, and age of the two individuals who walk in after the gate comes back into frame could not be determined. The Black woman holding hands with the child and the dark-skinned woman wearing the burka both walk in front of PO Haque to go down the stairs leading to the uptown 4/5/6 platform (**BR 37**, 0:19-0:47).

Based on PO Hossain's recording, the individual wearing all black who walks through the gate directly in front of § 87(2)(b) appears to be the same person who is walking in front of § 87(2)(b) when PO Haque first approaches her (**BR 5**, 2:20-2:31). At 2:30 on PO Haque's recording, PO Haque approaches § 87(2)(b) while this individual is walking just a few feet in front of her. From this vantage point, this individual appears to be a Black woman who is approximately in her thirties, wearing a black winter coat and a grey beanie and headphones that cover her hair. Although this woman is physically closer to PO Haque and is within his arm's reach, he ignores this woman and approaches § 87(2)(b) instead (**BR 4**).

PO Hossain's body-worn camera depicts PO Haque standing in frame several feet in front of PO Hossain for the entire time period between when the emergency exit gate is opened and when PO Haque approaches § 87(2)(b) (BR 5). This recording shows that PO Haque was looking steadily in the direction of the emergency exit gate for almost the entire time when individuals were walking in through the gate before § 87(2)(b). At 1:47 on the recording, the emergency exit alarm begins to sound and PO Haque immediately turns his head and looks continuously in the direction of the gate. At 2:03, PO Haque turns his head away for approximately one second and glances at PO Acharjee before turning back towards the gate. At 2:13, PO Haque turns his head again for approximately one second to glance at PO Hossain and then looks steadily in the direction of the gate again. At 2:28, PO Haque begins walking towards § 87(2)(b) to conduct the stop. (BR 17).

During his interview, PO Haque testified that § 87(2)(b) was the first person he observed walk through the emergency exit gate at the time when he stopped her (BR 17). The investigation played PO Haque's body-worn camera recording starting at 1:41. PO Haque identified the emergency exit that § 87(2)(b) walked through on the lower right side of the screen. PO Haque identified the sound that starts at 1:46 as the emergency exit gate alarm. The interactive zoom feature was used to zoom in on the lower right corner of the screen from 1:50 to 2:23, with the emergency exit gate in frame. When asked if PO Haque saw other individuals walking through the emergency exit during this clip, PO Haque said, "I was keep moving so I don't know. Like, when I saw her, then I approached to her" (BR 17, 27:46). At 2:23 on the body-worn camera recording, the zoom feature was taken off. The footage was paused at 2:30 and PO Haque identified § 87(2)(b) in the center of the screen. When asked if the person to the right of § 87(2)(b) on the screen—the Black woman wearing all black with a beanie on—walked through the gate in front of § 87(2)(b) PO Haque stated that he did not know. When asked if he saw any other people who walked through the gate before § 87(2)(b) PO Haque said no (BR 17, 28:40). When asked if this was because he was not looking in that direction, PO Haque said, "I saw she was walking through the gate, that's why I approached to her. Because I was looking around, because when we do stop someone—Another officer had already stopped someone, so I was looking around. When I turned that way, I saw she was walking, then I stopped" (BR 17, 28:59).

The investigation then played PO Hossain's body-worn camera recording starting at 1:40 for PO Haque. PO Haque identified himself on the right side of the frame. PO Haque identified the emergency exit alarm at 1:50. The video was paused at 2:30 and Investigating Attorney Barrett pointed out that in the clip that was just shown, it looked like PO Haque was looking in the direction of the emergency exit gate for the most part. When asked if that was what PO Haque saw in the video, he said, "I don't think so because I was moving around at that time" (BR 17, 31:30). When asked if it was his testimony that § 87(2)(b) was the first person he saw walk through the gate, PO Haque said yes (BR 17, 31:43). PO Haque denied taking law enforcement action based on § 87(2)(b) race, gender, or age.

NYPD Administrative Guide Section 304-17: Department Policy Prohibiting Racial Profiling and Bias-Based Policing prohibits officers from making "a decision to initiate [law] enforcement action against a person [that] is motivated even in part by a person's actual or perceived race, color, ethnicity or national origin, . . . unless the officer's decision is based on a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics or information." In addition, A.G. 304-17 prohibits "an act by a member of the [] police department. . . that relies on the actual or perceived [] creed, age, immigration or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than individual's behavior or other information or circumstances that links a person to suspected unlawful activity" (BR 20).

By alleging that the officers stopped her because she is a young, Asian woman, § 87(2)(b) has alleged what courts, governmental agencies that enforce anti-discrimination laws and legal scholars of discrimination describe as “intersectional discrimination.” “A [complainant] states an intersectional discrimination claim when he or she alleges discrimination on the basis of two protected characteristics (such as sex and race) and shows that the discrimination he or she experienced is attributable, at least in part, to the combination of those protected characteristics.” *Anderson v. New York City Health & Hosps. Corp.*, No. 16 Civ. 1051 (GBD) (KHP), 2020 U.S. Dist. LEXIS 36772, *34 (S.D.N.Y. 2020)(**BR 38**); *See also* U.S. Equal Employment Opportunity Comm’n, Office of Legal Counsel, Directives Transmittal, EEOC Compliance Manual 3 (Apr. 19, 2006) at 15-IV, <http://www.eeoc.gov/policy/docs/race-color.pdf> (Stating that intersectional discrimination occurs when an individual faces discrimination “because of the intersection of two or more protected bases”)(**BR 38**); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 Univ. of Chicago Legal Forum 8 (1989) (identifying mistaken assumption that “a discriminator treats all people within a race or sex category similarly” and noting that failure to recognize intersectional discrimination “obscures claims that cannot be understood as resulting from discrete sources of discrimination.” (**BR 38**).

Because where multiple bases of discrimination exist, they “cannot be neatly reduced to distinct components,” *Lam v. Univ of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994)(**BR 38**), federal courts in the New York and around the country recognize the legal viability of intersectional discrimination claims based on race, gender, and/or age. *See, e.g., Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d Cir. 2010)(intersectional gender-age discrimination against older woman plaintiff)(**BR 38**); *Anderson*, 2020 U.S. Dist. LEXIS 36772, *34 (intersectional race-gender discrimination against Black male plaintiff)(**BR 38**); *Robertson v. Wells Fargo Bank, NA*, 2016 U.S. Dist. LEXIS 25227 (D. Conn.2016)(intersectional race-gender discrimination against Black woman plaintiff)(**BR 38**); *Lam*, 40 F.3d at 1562 (holding that “when a plaintiff is claiming race and sex bias, it is necessary to determine whether the [alleged discriminator] discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex” and recognizing intersectional race-gender discrimination claim by Asian woman plaintiff)(**BR 38**); *Jefferies v. Harris Cty. Community Ass’n*, 615 F.2d 1025, 1034 (5th Cir. 1980)(intersectional race-gender discrimination claim by Black woman plaintiff)(**BR 38**); *Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948, 958 (6th Cir. 2014) (noting that race and sex, both protected classifications, “do not exist in isolation” and recognizing intersectional race-gender discrimination claim by Black woman plaintiff)(**BR 38**); *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1049 (10th Cir. 2020) (recognizing intersectional gender-age discrimination against older woman plaintiff)(**BR 38**).¹

Although, under Admin. Guide 304-17, racially-biased policing allegations are analyzed under the “motivating factor” standard and age-and gender biased policing allegations are analyzed under “determinative factor” standard of causation (**BR 20**), courts analyzing intersectional discrimination claims have used the motivating factor standard where, as here, at least one of the alleged bases for

¹ While these cases involve employment discrimination claims brought under Title VII of the Civil Rights Act of 1964, courts have frequently applied Title VII disparate treatment standards to analyses of intentional discrimination claims in policing and other law enforcement contexts. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986) (racial discrimination in jury selection) (**Board Review 38**); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (racial discrimination in jury selection); *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015) (racially discriminatory law enforcement action); *D.H. v. City of New York*, 309 F.Supp.3d 52, 75 (S.D.N.Y. 2018) (racially and gender biased police action) (**Board Review 38**). As such, the investigation relies on these standards here.

discrimination is analyzed under the motivating factor standard when it is alleged by itself. *See Anderson*, 2020 U.S. Dist. LEXIS 36772 at 34 (“[P]laintiff states an intersectional discrimination claim when he or she alleges discrimination on the basis of two protected characteristics (such as sex and race) and shows that the discrimination he or she experienced is attributable, *at least in part*, to the combination of those protected characteristics”)(emphasis added)(**BR 38**); *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018)(analyzing intersectional gender-age discrimination claim under motivating factor standard where gender discrimination claims were subject to motivating factor standard and age discrimination claims were subject to determinative/factor standard under federal employment discrimination law)(**BR 38**); *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010)(same)(**BR 38**). Thus, because race is one of the asserted bases for discrimination included in § 87(2)(b) intersectional bias allegation, the investigation analyzes her allegation under the motivating factor standard.

Under the motivating factor standard, the combination of the civilian’s race/age/gender traits does not have to be the sole, primary, or predominant motivation for the law enforcement action in question to substantiate an allegation of racially biased policing. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996); *Floyd v. City of New York*, 959 F.Supp.2d 540, 571 (S.D.N.Y. 2013) (**BR 38**). If the preponderance of the evidence establishes that the civilian’s combination of race/age/gender characteristics played any role in the officer’s decision making, the bias-based policing allegation should be substantiated, regardless of any non-discriminatory reasons the officer gives for their actions. *Yonkers*, 96 F.3d at 612; *Raza v. City of New York*, 998 F.Supp.2d 70, 79-80 (E.D.N.Y. 2013); *Bennett v. Health Sys., Inc.*, 92 A.D.3d 29, 40 (1st Dep’t 2011)(**BR 38**). Thus, a law enforcement action that is otherwise legally justified (e.g., a vehicle stop supported by probable cause of a traffic violation or a stop to issue a summons for a pedestrian violation witnessed by the officer) can still constitute bias-based policing if the officer was motivated at least in part to take the action by the combination of the civilian’s actual or perceived race/gender/age traits. *See PBA v. City of N.Y.*, 142 A.D.3d 53, 66-67 (1st Dept 2016); *Raza*, 998 F.Supp.2d at 79; *Floyd*, 959 F.Supp.2d at 667 (**BR 38**).

Moreover, courts decline to disaggregate evidence where multiple protected categories are at issue in a discrimination complaint. *See Payne v. New York City Police Dept. et al*, 863 F.Supp.2d (E.D.N.Y. 2012); *Millin v. McClier Corp.*, No. 02 Civ. 6592 (GEL), 2005 U.S. Dist. LEXIS 2024, at *17 (S.D.N.Y. Feb. 14, 2005). *See also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (permitting plaintiff to aggregate evidence of racial and sexual hostility); *Feingold v. New York*, 366 F.3d 138 (2d Cir. 2004) (permitting plaintiff to aggregate evidence of racial and religious animosity) (**BR 38**).

Because discriminatory intent “is rarely susceptible to direct proof,” it is often established through circumstantial evidence. *Millan-Hernandez v. Barr*, 965 F.3d 140, 148 (2d Cir. 2020); *Bennett*, 92 A.D.3d at 40-41 (**BR 38**). However, rarely is one piece of circumstantial evidence sufficient on its own to establish racially discriminatory intent. The factfinder must instead consider the “totality of the relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (**BR 38**). Examples of circumstantial evidence to consider include, but are not limited to:

- i. the sequence of events leading up to the law enforcement actions at issue;
- ii. selective enforcement of the law against a member of a particular demographic group but not against a member of another demographic group engaged in similar behavior;
- iii. the falsity of the officer’s non-discriminatory explanations for their actions;

- iv. officer history of prior biased acts or similar misconduct committed against persons from the complainant/victim's racial/ethnic group; and
- v. data showing a pattern of racial disparities in the officer's enforcement activity over time.

Each of these factors will be discussed in turn below in relation to PO Haque.

i. The sequence of events leading up to the law enforcement actions at issue

The United States Supreme Court has held that when analyzing claims of discrimination, “[t]he specific sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker’s purposes.” *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977). The events leading up to a challenged law enforcement action, in combination with other circumstantial evidence, can support a finding that the officer who took the action was motivated by bias. *See, e.g., Rodriguez v. Barr*, 943 F.3d 134, 142-43 (2d Cir. 2019); *Ballew v. City of Pasadena*, 642 F.Supp.3d 1146, 1168 (C.D. Cal. Nov. 23, 2022); *Commonwealth v. Long*, 152 N.E.3d 733, 739-40 (Mass. 2020); *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1169 (10th Cir. 2003) (**BR 31**).

The sequence of events leading up to PO Haque’s stop of § 87(2)(b) raises questions regarding whether his decision to stop § 87(2)(b) was motivated by bias. Body-worn camera footage shows that at least sixteen individuals walked through the emergency exit gate before § 87(2)(b) and PO Haque did not attempt to stop any of them. When opened, the gate made a loud continuous sound that immediately drew PO Haque’s attention, and that PO Haque acknowledged that he recognized during his interview. From PO Hossain’s vantage point, PO Haque can be seen looking in the direction of the emergency exit gate for almost the entire time that these individuals would have been walking through the gate, making it highly implausible that PO Haque did not see at least some of these other violators. Based on PO Haque’s body-worn camera footage, he would have been able to see the race, gender, and ages of at least some of the individuals who walked through the emergency gate from where he was standing, including § 87(2)(b). Evidence that an officer knew an individual’s race before stopping the individual supports an inference that the individual’s race may have played a role in the officer’s decision to conduct the stop. *See Marshall*, 345 F.3d at 1169; *Ballew*, 2022 U.S. Dist. LEXIS 233385 at *20-22; *Long*, 152 N.E.3d at 740 n.9 (**BR 31**).

Although PO Acharjee was conducting a stop at this time, the video evidence shows that PO Haque did not focus his attention on this stop once the emergency gate opened. § 87(2)(b) was not arguing with or showing any resistance to PO Acharjee and PO Hossain while they wrote her summons. PO Haque was standing several feet behind them and was not providing any active support for their stop, and he approached § 87(2)(b) before their stop of § 87(2)(b) was concluded. Additionally, PO Wetzel was unoccupied just a few feet away and available to assist PO Haque in conducting a new stop. When PO Haque eventually stopped § 87(2)(b) PO Wetzel provided backup almost immediately. Based on these facts, it does not appear that PO Haque waited to conduct a stop based on tactical or safety concerns, and he did not make any claims to this effect in his interview, as discussed below.

ii. Selective enforcement of the law against a member of a particular demographic group but not against a member of another demographic group engaged in similar behavior

The Equal Protection Clause of “the Constitution prohibits selective enforcement of the law based on considerations such as race,” even when there is an objective legal basis (e.g., probable cause)

for the law enforcement action taken. *Whren v. United States*, 517 U.S. 806, 813 (1996); *People v. Robinson*, 97 N.Y.2d 341, 351-52 (2001); *Floyd*, 959 F.Supp.2d at 667 (**BR 31**). An officer taking law enforcement action against a member of a particular demographic group but not against a member of another demographic group engaged in similar behavior therefore can be strong evidence that the action was racially motivated. In *Floyd v. City of New York*, a stop of a Black pedestrian was held to be racially motivated in part because “other non-black individuals were present and presumably behaving no differently than McDonald – yet only McDonald was stopped.” *Floyd*, 959 F.Supp.2d at 633. *See also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.”) (**BR 31**). Similarly, although PO Haque may not have violated the law or even any Department policies or procedures through his actions in this case, treating § 87(2)(b) differently than other similarly situated individuals because of her race, gender, and/or age would be an example of selective enforcement of the law.

As discussed above, the investigation is not able to determine the genders, races, and ages of all of the individuals who committed fare evasion before § 87(2)(b) based on the available video. The video evidence does show, however, that several of these individuals appear to be different races, genders, and ages than § 87(2)(b) and that none of these individuals can be determined to be young Asian women. The first person to walk through the gate appeared to be a middle-aged Asian man or woman with short hair. Although the same race as § 87(2)(b) this person is significantly older and more androgynous looking than she is. This person is carrying a plastic bag full of cans. The third violator appears to be a man with a medium skin tone. A few of the individuals appear to be Black or dark-skinned women. The individual who walked through the gate directly before § 87(2)(b) and who was still walking in front of her when PO Haque stopped her—appears to be a Black woman who is approximately in her thirties. As discussed below, PO Haque’s explanation for ignoring this woman and focusing on § 87(2)(b) is not supported by the facts. It is possible that one or more of the individuals whose gender and/or race could not be determined was a young Asian woman, or that a young Asian woman could have walked through the emergency gate during one of the brief time periods when the gate was not visible on camera. The fact that several individuals of different races, genders, and ages committed fare evasion before § 87(2)(b) calls into question why PO Haque would ignore these other individuals and focus his enforcement efforts only on § 87(2)(b) however.

iii. The falsity of the officer’s non-discriminatory explanations for their actions

The falsity of a law enforcement officer’s non-discriminatory explanation for their actions can also support a finding that the officer was trying to conceal a discriminatory motive. *Turkmen v. Hasty*, 789 F.3d 218, 256-57 (2d Cir. 2015), *rev’d on other grounds*, 137 S.Ct. 1843 (2017), citing to *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48 (2000). “Moreover, once the . . . justification has been eliminated, discrimination may well be the most likely alternative explanation.” *Id.* at 147. (**BR 31**).

When confronted with the above discrepancies during his interview, PO Haque did not provide a credible non-discriminatory explanation. During the beginning of the interview, PO Haque was asked several different ways about how he would decide who to stop if he observed multiple individuals committing the same violation. PO Haque did not list any factors he would consider when deciding how to use his discretion in conducting a stop, only stating that he would stop whatever violations he saw. When prompted by his representative, he denied that he would consider factors such as race and gender when conducting a stop (**BR 17**, 12:15-14:30). As discussed above, when asked about this specific incident, PO Haque stated that § 87(2)(b) was the first person he saw

walk through the emergency exit gate. When shown video of the other sixteen individuals who committed fare evasion before § 87(2)(b) PO Haque stated that he was “looking around” at that time and was not looking at these individuals because PO Acharjee was conducting a stop. When shown PO Hossain’s recording, which depicts PO Haque looking in the direction of the emergency exit gate for the majority of the time, PO Haque continued to deny that he had seen these individuals and stated instead that he was “moving around at that time” (**BR 17**, 27:46-31:30).

Based on PO Haque and PO Hossain’s recordings, it is highly unlikely that PO Haque did not observe at least some of the individuals who committed fare evasion before § 87(2)(b). It is particularly unlikely that PO Haque did not observe the Black woman who committed fare evasion approximately a second before § 87(2)(b) who was walking just a few feet in front of § 87(2)(b) when PO Haque stopped her. The investigation does not find PO Haque’s non-discriminatory explanation to be credible or plausible, and the potential falsity of his explanation highlights his disparate treatment of violators of different races, genders, and ages.

iv. *Officer history of prior biased acts or similar misconduct committed against persons from the complainant/victim’s racial/ethnic group*

“Proof of prior discriminatory conduct” by an alleged discriminator against members of the complainant’s demographic group “is relevant to their motive and intent at the time of the acts at issue,” *Open Housing Ctr v. Kings Highway Realty*, 1993 U.S. Dist. LEXIS 15927, *18-21 (E.D.N.Y. Nov. 8, 1993), especially if the prior conduct “is similar in nature to that experienced by the [complainant].” *Zubulake v. UBS Warburg, LLC*, 382 F.Supp.2d 536, 544. (S.D.N.Y. 2005); *Todaro v. Siegel, Fenchel & Peddy, P.C.*, 2008 U.S. Dist. LEXIS 17894, *13 (S.D.N.Y. Mar. 3, 2008) (**BR 32**).

The investigation received PO Haque’s Central Personnel Index, prior EEO bias complaint history, lawsuit history, and adverse credibility findings (**BR 43**, **BR 46**). PO Haque has been a member of the NYPD for three years and he has no prior history of similar discriminatory conduct. Additionally, this is the first CCRB complaint in which PO Haque has been named as a subject.

Thus, this category of evidence does not support an inference that PO Haque’s actions in this case were motivated by racial, gender, and/or age bias.

v. *Data showing a pattern of racial disparities in the officer’s enforcement activity over time*

Data showing a pattern of racial disparities in a police officer’s enforcement activity over time are widely recognized as important circumstantial evidence to consider in a “totality of the relevant facts” analysis of an allegation of racial profiling against that officer. *See, e.g., Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003); *Anderson v. Cornejo*, 284 F.Supp.2d 1008, 1050 (N.D. Ill. 2003); *Johnson v. Holmes*, 782 Fed.Appx. 269, 281-82 (4th Cir. 2019); *Commonwealth v. Long*, 152 N.E.3d 733, 739-40 (Mass. 2020) (**BR 34**). For example, data that show that:

- (a) the racial composition of persons stopped for violations by the subject officer in the years/months preceding the incident in question varied significantly from the racial composition of the residential population near the geographic areas patrolled by that

officer, *Ballew v. City of Pasadena*, 2022 U.S. Dist. LEXIS 233385, *22-25 (C.D. Cal. Nov. 23, 2022); *Commonwealth v. Long*, 152 N.E.3d at 745-46, and

- (b) the racial composition of persons stopped by the subject officer varied significantly from the racial composition of persons stopped by other officers working in similar assignments and locations and at similar times of day, *Johnson*, 782 Fed.Appx. at 281-82; *United States v. Mesa-Roche*, 288 F.Supp.2d 1172, 1188-90 (D. Kan. 2003); Greg Ridgeway and John MacDonald, *Methods for Assessing Racially Biased Policing*, 13-18 (RAND Corp. 2011), 8 available <https://www.rand.org/pubs/reprints/RP1427.html> (BR 34).

can, when combined with other pieces of circumstantial evidence, support a finding that the subject officer acted with discriminatory intent during the specific stop under investigation.

The CCRB's Racial Profiling/Biased Policing Investigations (RPBP) Unit requested from the NYPD all Transit Adjudication Bureau (TAB) Summonses completed by PO Haque and all other officers assigned to his command and tours for the year preceding the stop of § 87(2)(b) (BR 35). The RPBP Unit's Chief Data Scientist and Data Analyst then analyzed this data to determine whether any disparate patterns were present in PO Haque's summons activity. That information was compiled and evaluated in a memorandum created by the Chief Data Scientist and Data Analyst (hereinafter "the data memo") (BR 35).

PO Haque issued 93 TAB summonses between January 14, 2022 and January 14, 2023, 70 of which were for fare evasion. Looking at race, gender, and age in isolation, PO Haque issued comparable percentages of summonses to Asian/Pacific Islander (AAPI) civilians and female civilians but a larger percentage of summonses to young civilians relative to other officers in his command. PO Haque issued 9% of his fare evasion summonses to AAPI civilians (6 out of 70 summonses), compared to 5% for his command. He issued 31% of his fare evasion summonses to women, compared to 22% for his command. He issued 64% of his fare evasion summonses to people under age 30 years, compared to 45% for his command. There are additional discrepancies between PO Haque's fare evasion summonses and those issued by his command when the data is analyzed intersectionally, looking at multiple demographic categories simultaneously. For example, PO Haque issued 24% of his fare evasion summonses to women under age 30 years compared to 9% for his command. He issued 7% of his fare evasion summonses to AAPI women compared to 2% for his command. Finally, PO Haque issued 7% of his fare evasion summonses to AAPI women under age 30 years compared to 1% for his command. The Data Scientist considered these comparisons between PO Haque and the rest of the command to be similar results since the numbers are within 10 percentage points of one another. (BR 35, Tables 4-7).

According to the data memo, the six fare evasion summonses PO Haque issued to AAPI civilians do not provide the investigation with enough information to quantitatively examine whether PO Haque disproportionately issued TAB summonses to young, female, AAPI civilians. The gender and age compositions of these summonses are suggestive, however. Namely, five of the six summonses PO Haque issued to AAPI civilians were issued to female civilians, and all five of these summonses were issued to civilians under 30 years of age. PO Haque issued more fare evasion summonses to young, Asian women during the previous year (5 out of 70 summonses) than were issued by the rest of the officers in the command (2 out of 398 summonses). Furthermore, AAPI civilians make up a considerably higher percentage of PO Haque's summonses of women than his summonses of men (23% of women summonsed were AAPI civilians vs. 2% of men). This difference is greater when comparing young women PO Haque summonsed with all other civilians he summonsed (29% of women under age 30 years summonsed were AAPI vs. 2% of all other civilians summonsed). This is not the case for the rest of PO Haque's command, where 6% of

summonses of women under age 30 years were given to AAPI civilians and 5% of all other civilians summonsed were AAPI civilians. PO Haque's summonses of AAPI women also skew younger than his summonses of all other civilians (100% of AAPI women summonsed were under age 30 years vs. 62% of all other civilians summonsed. (BR 35, Tables 8-14).

Accordingly, this category of evidence does support an inference that PO Haque's stop of § 87(2)(b) was motivated by bias.

vi. Summary of Evidence and Recommendation

The above categories of circumstantial evidence demonstrate that: 1) PO Haque observed at least 16 individuals commit fare evasion before § 87(2)(b) 2) at least some of those individuals were different races, genders and/or ages than § 87(2)(b) and none were young Asian women, 3) a Black woman who is older than § 87(2)(b) and had also committed fare evasion was directly in front of § 87(2)(b) when PO Haque stopped her, 4) PO Haque's testimony that § 87(2)(b) was the first person he saw commit fare evasion is not credible, and 5) PO Haque's summons data contains some suggestions of bias against young Asian women. The investigation accepts that PO Haque cannot stop every individual who commits fare evasion. The question is why PO Haque decided to stop § 87(2)(b) rather than anyone else, and whether that decision was motivated by bias. The explanation PO Haque provided was disproven by the video evidence. This evidence also shows PO Haque walked past another fare evader of a different race and age, whom he could have easily stopped instead of or in addition to § 87(2)(b) § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party.
- PO Haque has been a member of service for 3 years and this is the first CCRB complaint to which he has been a subject.
- PO Wetzel has been a member of service for 5 years and this is the first CCRB complaint to which he has been a subject.
- PO Hossain has been a member of service for 8 years and has been a subject in 3 CCRB complaints and 2 allegations, none of which were substantiated.

Mediation, Civil, and Criminal Histories

- This complaint was not suitable for mediation.
 - As of April 3, 2024, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (BR 12).
 - [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]
- § 87(2)(b)

Squad No.: Bias Team 1

Investigator:	<u>/s/ Katherine Barrett</u> Signature	<u>Inv. Att. Katherine Barrett</u> Print Title & Name	<u>May 3, 2024</u> Date
Squad Leader:	<u>IM Carlmais Johson</u> Signature	<u>Carlmais Johnson</u> Print Title & Name	<u>May 3, 2024</u> Date
Reviewer:	<u>Darius Charney</u> Signature	<u>RPBP Dir. Darius Charney</u> Print Title & Name	<u>May 3, 2024</u> Date